UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NICOLE DOE, MANUEL DOE, and CARLA DOE, Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 02-11363-DPW
TOWN OF BOURNE, BOURNE SCHOOL COMMITTEE, JOHN GRONDIN, individually and in his official capacity as principal of Bourne High School, NANCY DEMITRI, individually and in her official capacity as school psychologist, DEREK TIMO, and JASON HOOK, Defendants.	)	

MEMORANDUM AND ORDER
May 28, 2004

Plaintiffs, Nicole Doe and her parents, Manual and Carla Doe, bring this action stemming from a sexual assault and subsequent harassment of Nicole by students at the Town of Bourne public high school. Plaintiffs seek compensatory and punitive damages under § 504 of the Rehabilitation Act of 1973, 42 U.S.C. § 1983, and Title IX of the Education Act Amendments of 1972. They additionally bring state law tort claims for intentional infliction of emotional distress. Defendants Grondin, the high school principal; Demitri, the school psychologist; and the Town of Bourne and its school committee have moved for summary

judgment as to all counts pertaining to them. For the reasons set forth below, I will grant the motion.

I. BACKGROUND

A. Facts

The following underlying facts are taken from the Does' Second Amended Complaint ("Complaint"). They are not, for purposes of this motion, disputed by the parties. Nicole Doe was a student at Bourne High School from September 1995 to June 1999. Complaint ¶ 12. In the fall of 1995, Derek Timo, a student at the high school, grabbed Nicole and dragged her into a bathroom after school hours, forced her to perform oral sex on him, and threw her against the wall. Id. ¶¶ 14-16. As he left the bathroom, Timo warned Nicole in a threatening manner not to tell anyone what happened, "or else." Id. ¶ 21.

Following the incident, Timo and other unidentified individuals continued to harass Nicole physically and verbally during school.[1] Id. ¶¶ 24-28. Nicole claims to have reported being pushed into lockers to the school principal, John Grondin, but neither Grondin nor any other school officials took any

[1]The Complaint alleges that "unknown students would push [Nicole] into the lockers which lined the walls of the student corridors, grabbing her breasts, and swearing at her calling her bitch and other derogatory names." Complaint ¶ 24. In addition, the Complaint alleges that defendant Jason Hook repeatedly sought out Nicole after volleyball practice, grabbing her, twisting her arm, and beating her shoulder blade, as well as swearing at her and threatening her. Id. ¶¶ 27-28. The Complaint further alleges that Hook came to Nicole's house when her parents were not home and physically assaulted her, throwing her against a bed and beating her with coat hangers. Id. ¶ 32.

action. Id. ¶ 25. Nicole alleges that upon reporting the incidents to Grondin, the harassment worsened, and she came to believe that the school administration and staff were protecting the students who were harassing her. Id. ¶ 30. The harassment continued throughout Nicole's freshman, sophomore, and junior years, and over that period, Nicole dropped out of all school-related activities, changed her dress and appearance to conceal her sexuality, and withdrew as much as possible from school life. Id. ¶ 33.

Sometime in early November of 1998, Laura Mahoney, a friend of Nicole, disclosed to Nancy Demitri, the school psychologist, that Nicole had been raped by Timo, and after a meeting with Nicole,[2] Demitri referred Nicole to a rape counselor. Id. ¶ 37. The rape counselor told Demitri and the school staff that Nicole needed serious help and that her parents should be contacted. Id. ¶ 41. Demitri notified Grondin of the situation, but the school did not inform Nicole's parents of the sexual assault by Timo or otherwise inform them of Nicole's situation.[3] The Complaint alleges that the school took no further action and did

[2]According to a statement by Detective Michael Kelley, the meeting between Nicole and Demitri took place on November 18, 1998. Plaintiffs' Statement of Disputed Material Facts, Ex. 4, at 7.

[3]Principal Grondin apparently sought the advice of town counsel as to whether he was required to inform Nicole's parents, despite Nicole's request that they not be told, and town counsel told him he was not because Nicole was over 16 years old. Plaintiffs' Statement of Disputed Material Facts, Ex. 4, at 7-8.

not report the incident to the police.[4] Nicole finally informed her parents of the sexual assault on March 11, 1999, Plaintiffs' Statement of Disputed Material Facts, Ex. 3, at 2, and her parents immediately called the police. Id. Timo was thereafter charged with and pled guilty to one count of indecent assault and was sentenced to two years of imprisonment by the Massachusetts Superior Court. Complaint ¶ 56.

In the spring of 2002, Nicole requested and received her school file and found it did not contain any disciplinary reports, references to any school rule violations, incident reports, or any reports relating to sexual assault. Id. ¶ 57.

B. Procedural History

On April 17, 2002, the Does filed a request for a hearing before the Massachusetts Bureau of Special Education Appeals ("BSEA"). Administrative Record ("AR"), at 79. They incorporated within the request an eleven-count complaint against the Town of Bourne public schools[5] stemming from the sexual assault on Nicole. The complaint alleged, inter alia, violations of Title IX, § 504 of the Rehabilitation Act of 1973, 42 U.S.C. § 1983, and the Individuals with Disabilities Education Act ("IDEA"). Id. at 5-15.

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[4]According to the Complaint, in addition to Demitri and Grondin, Assistant Principal Bill Gibbons and two teachers were made aware of the situation. Complaint ¶¶ 43, 46.

[5]The Does filed their complaint against the Town of Bourne, School Department, but in the complaint, they included as defendants Grondin, Demitri, and Timo. AR, at 4.

The Town of Bourne filed a motion for summary judgment in the administrative proceeding, arguing that the BSEA should dismiss the Does' claims because it had no authority to award monetary damages. Id. at 42. The BSEA hearing officer granted summary judgment, dismissing nine of the claims for lack of jurisdiction and the remaining two claims as barred by the statute of limitations.

Meanwhile, the Does filed the present case on July 2, 2002, alleging thirteen claims stemming from the sexual assault on and harassment of Nicole. They subsequently brought a separate case in this court, No. 02-12052 (D. Mass filed Oct. 21, 2002), against, inter alia, the Town of Bourne and David Driscoll, Commissioner of the Massachusetts Department of Education,[6] to challenge the BSEA's summary judgment dismissal of the administrative claims. In that case, I granted defendants' motion for summary judgment as to the claim for review of the BSEA decision, giving an oral statement of reasons at the hearing on September 24, 2003, and I ordered all remaining claims to be consolidated into the present case.

As a result, seventeen counts against five defendants remain in the present, consolidated case,[7] and defendants Grondin,

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[6]The other named defendants in No. 02-12052 were the Commonwealth of Massachusetts, the Bourne School Committee, Grondin, and Demitri.

[7]At the September 24, 2003 hearing, I allowed plaintiffs to file a second amended complaint in this case, which contained 20 counts. But three of the counts (Counts 5, 6, and 20) of the amended complaint were dismissed in accordance with the grant of

Demitri, and the Town of Bourne and its school committee now move for summary judgment motion as to the thirteen variously naming them.[8] Ten of the counts allege federal statutory causes of action: under Title IX (Count 1), 42 U.S.C. § 1983 ("§ 1983") (Counts 2-4 and 9-12), and § 504 of the Rehabilitation Act of 1973 ("§ 504") (Counts 7-8). The remaining three counts allege intentional infliction of emotional distress by Nicole, Manuel, and Carla, respectively (Counts 17-19).

II. DISCUSSION

A. Standard of Review

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). If the party seeking summary judgment can make a preliminary showing that no genuine issue of material fact exists, the nonmovant must point to specific facts demonstrating that there is, indeed, a trialworthy issue. Calero-Cerezo v.

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summary judgment in the companion case prior to consolidation.

At the May 26, 2004 hearing on the instant motion for summary judgment, plaintiffs' counsel stipulated that the claims against the named defendant Joy and the three John Doe defendants were being dropped.

[8]The four counts excluded from the present motion are those exclusively against Timo and/or Hook (Counts 13-16), who have taken no action to move for summary judgment. Those counts allege violations of 42 U.S.C. § 1985, assault and battery, and a violation of Mass. Gen. Laws ch. 265 § 13H.

U.S. Dep't of Justice, 355 F.3d 6, 19 (1st Cir. 2004).

A fact is "material" if it has the "potential to affect the outcome of the suit under the applicable law," Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000), and for an issue to be "genuine," the evidence relevant to the issue, viewed in the light most flattering to the non-moving party, must be "sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side." Nat'l Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995). "[C]onclusory allegations, improbable inferences, and unsupported speculation," are insufficient to establish a genuine dispute of fact. Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990). Rather, "[t]he evidence illustrating the factual controversy . . . must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve." Mack v. Great Atl. & Pac. Tea Co., 871 F.2d 179, 181 (1st Cir. 1989).

B. Failure to State a Claim

Although the procedural posture on which the claims at issue are presently before me is that of summary judgment, very little in the way of record evidence has been presented by either party in connection with the present motion. In fact, defendants' statement of facts derives almost exclusively from the Complaint. Thus, the present motion is more akin to a motion on the pleadings than for summary judgment, and a number of the Does' claims--specifically, their § 504 claims and the § 1983 claims--

warrant dismissal for what amounts to failure to state a claim. I therefore begin my analysis by addressing, in turn, these two sets of claims. I turn thereafter to the Title IX and state tort claims.

1. § 504 Rehabilitation Act Claims (Counts 7 & 8)

As defendants note, albeit in passing, the Does' § 504 claims, which they bring against Grondin and Demitri, in Counts 7 and 8, respectively, are more properly against the Town of Bourne school district.[9] Indeed, in the original administrative proceeding before the BSEA, the Does raised claims under § 504 against the Bourne public schools. Following dismissal of the claims by the BSEA on statute of limitations grounds, which I upheld at summary judgment in the companion case, the Does here attempt to revive their § 504 theory by raising it against Grondin and Demitri in their individual capacities.

I need not revisit the statute of limitations issue with respect to these claims because individuals in their individual capacities are not liable under § 504, which applies only to recipients of federal financial aid. Garcia v. S.U.N.Y. Health

[9]Section 504 states:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794(a).

Sciences Ctr., 280 F.3d 98, 107 (2d Cir. 2001) ("[N]either Title II of the ADA nor § 504 of the Rehabilitation Act provides for individual capacity suits against state officials."); Castro Ortiz v. Fajardo, 133 F. Supp. 2d 143, 150-51 (D.P.R. 2001) (citing cases holding that "no personal liability can attach to agents and supervisors under Title VII, ADEA, ADA or the Rehabilitation Act"). But see McCachren v. Blacklick Valley Sch. Dist., 217 F. Supp. 2d 594 (W.D. Pa. 2002)(allowing individual capacity claims under § 504). The mere fact that in the Complaint the Does name Grondin and Demitri in their official, as well as individual, capacities is not sufficient to state a viable claim; they do not allege, nor have they adduced any evidence, that Grondin or Demitri received federal funds for the Bourne schools. See Emerson v. Thiel College, 296 F.3d 184, 190 (3d Cir. 2002) ("Because the individual defendants do not receive federal aid, [plaintiff] does not state a claim against them under the Rehabilitation Act."); Mitchell v. Mass. Dep't of Corr., 190 F. Supp. 2d 204, 213 (D. Mass. 2002) (dismissing Rehabilitation Act claims because "[t]here is no evidence here that [individual defendants] are a 'program or activity receiving Federal financial assistance.'" (quoting 29 U.S.C. § 794(a))). Thus, I dismiss the § 504 claims in Counts 7 and 8.[10]

[10]Even were I to conclude that § 504 claims could be brought against Grondin and Demitri, the Does' claims would not survive summary judgment. Dismissal would be warranted not only because the Does failed to exhaust available administrative remedies as required by § 1415(*l*) of the IDEA, Rose v. Yeaw, 214 F.3d 206, 210 (1st Cir. 2000); cf. Weber v. Cranston Sch. Comm., 212 F.3d

2. § 1983 Claims (Counts 2-4, 7-8, & 9-12)

"Properly construed, section 1983 'supplies a private right of action against a person who, under color of state law, deprives another of rights secured by the Constitution or by federal law.'" Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 57 (1st Cir. 2002) (quoting Evans v. Avery, 100 F.3d 1033, 1036 (1st Cir. 1996)). Here, because Grondin and Demitri were acting as employees of a public school system, they were, in their official capacities, acting under color of state law, see Frazier, 276 F.3d at 57-58, and while § 1983 by its plain terms applies to "persons," it has been construed to apply to municipalities like the Town of Bourne where action pursuant to a municipal custom or policy caused a constitutional tort. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690-91 (1978).

However, to state a claim under § 1983, the Does must allege an act or omission which deprived them of a "federally-protected right." Nieves v. McSweeney, 241 F.3d 46, 53 (1st Cir. 2001) (emphasis added). Here, the Does bring in total seven separate § 1983 claims variously against defendants, and in most, the Does fail to specify any federal right to undergird the claims.

The clearest examples of this are Count 11 (against Grondin and the Town of Bourne) and Count 12 (against Demitri), both of

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41, 50 (1st Cir. 2000) (rejecting argument that administrative remedies need not be exhausted before parent can bring § 504 claim), but also for the more central reason that, as noted by the BSEA, the Does have made no showing that Nicole was eligible for § 504 services in the first instance. AR, at 87.

which fall under a heading beginning "1983 Breach of Fiduciary Duty." Count 11 alleges that Grondin breached the fiduciary duty he owed as principal of Bourne High School to the Does under chapter 71B of Mass. Gen Laws. Count 12 alleges that Demitri breach a fiduciary duty owed to Nicole that arose from her

> holding herself out as school psychologist and undertaking emotional counseling of Nicole, interceding for her with school administration and knowing that her primary professional responsibility and client was Nicole and given her professional responsibility to act responsibly in the best interest of the child and to provide said child all information required by legal affirmative duties required by law and to follow all legal mandates required by both state and federal law.

Complaint ¶ 164. The counts do not set forth a basis in any federal statute or in the Constitution for the fiduciary duties described in the allegations, and neither can I on my own initiative conjure up any such basis.[11] Accordingly, I dismiss Counts 11 and 12.

While Counts 9 and 10 include reference to a federal statute, they nevertheless fail to state a claim because they do not identify a federally-protected right. See Long Term Care Pharmacy Alliance v. Ferguson, 362 F.3d 50, 57 (1st Cir. 2004) ("[S]ection 1983 requires a violation of a private federal right and not just a federal law."). The bulk of the allegations in

[11]The vague reference to federal law in Count 12 is not enough to sustain the claim; indeed, Count 12 does not allege that the unspecified federal law gave rise to the fiduciary duty but rather only that Demitri knew she was to abide by the legal mandates of federal law.

the two counts[12] allege what amount to violations of the Family Educational Rights and Privacy Act ("FERPA") by the school.[13] The Does claim that school officials failed to maintain, and in fact destroyed, Nicole's school records, thereby infringing the Does' right to access the records under FERPA. 20 U.S.C. § 1232g(a). However, in Gonzaga University v. Doe, 536 U.S. 273 (2002), the Supreme Court explicitly foreclosed the possibility of § 1983 claims under FERPA, concluding that the FERPA provisions "fail to confer enforceable rights."[14] Id. at 287;

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[12]Counts 9 and 10 are titled "1983 Fraud as to Town of Bourne" and "1983 Obstruction of Justice as to the Town of Bourne," respectively. Aside from their headings, however, the two counts are virtually indistinguishable.

[13]The first paragraphs of both Count 9 and Count 10 allege that Grondin and Demitri conspired to fraudulently deprive Nicole of

> the equal protection of the laws by depriving Nicole of her equal opportunity to access the complete and full educational opportunity to her full potential any by hindering the constituted authorities of the State of Massachusetts and Bourne Police Department from providing Nicole the equal protections of the law.

Complaint ¶¶ 133, 146. These allegations are conspicuously misplaced both because of their content and the heading indicating the counts as against the Town of Bourne. In their opposition to summary judgment, the Does do not mention equal protection as grounds for their § 1983 claims, and to the extent they attempt to allege such grounds, these paragraphs are hardly sufficient to do so. In any event, insofar as the Does pursue a equal protection basis for their claims against Grondin and Demitri, such claims suffer the same fate as similar claims against the Town of Bourne, as discussed infra.

[14]While Gonzaga considered only the nondisclosure provisions of § 1232g(a) of FERPA, its reasoning is equally applicable to all of § 1232(a) and therefore covers the Does' allegations concerning violations of their right to access their records. See Taylor v. Vermont Dep't of Educ., 313 F.3d 768 (2d Cir. 2002) (FERPA's records-access provisions create no personal rights enforceable under § 1983).

cf. Frazier, 276 F.3d at 69 (no implied right of action under FERPA). Accordingly, the allegations in Counts 9 and 10 fail to state a claim under § 1983, and I will dismiss them.

Whether any of the remaining three § 1983 claims have any basis in a federally-secured right is somewhat more difficult to discern, primarily because of the confusingly-worded Complaint. Count 3 alleges that Grondin, acting under color of state law as principal of Bourne High School:

> willfully and knowingly obstructed justice by his failure to notify the Department of Social Services as required by law or the Bourne Police Department meant [sic] that a felony was committed upon a child under his care, custody, and control on school property.

Complaint ¶ 95. Count 4, using the exact same language, makes an identical allegation as to Demitri. Id. ¶ 100. The Complaint, however, provides no indication in what way Grondin's and Demitri's alleged failure to notify the Department of Social Service or the Bourne Police, even if a violation of presumably state law or regulations, infringes on a federally-protected right. See Pierce v. Delta County Dep't of Soc. Servs., 119 F. Supp. 2d 1139, 1152 (D. Colo. 2000) (no § 1983 claim based on alleged violations of duties to report child abuse under Colorado's Child Protection Act).

Count 3, however, also alleges that the "principal of the high school owes a duty to all minor children under his control and care to protect and keep said children free from abuse," Complaint ¶ 96, and Count 4 makes a similar statement about the school psychologist. Id. ¶ . These allegations conceivably

hint, while admittedly only on a liberal reading, at concern regarding a constitutionally-based substantive due process right to be free from bodily injury protected by the Fourteenth Amendment. See Youngberg v. Romeo, 457 U.S. 307, 315 (1982). Indeed, the only basis for their § 1983 claims the Does mention in their opposition brief is violation of Nicole's substantive due process right, and I can only surmise they are referring to Counts 3 and 4 because no other § 1983 counts in the Complaint even hint at such a violation as to Grondin and Demitri.

A § 1983 claim for a violation of Nicole's constitutional right to bodily integrity clearly cannot be based in any affirmative actions by Grondin or Demitri; the Complaint nowhere alleges that either directly harmed or otherwise harassed Nicole. Rather, the only basis for such a claim would be Grondin's and Demitri's failure to act in supervisory roles. However, "[s]upervisory liability under § 1983 'cannot be predicated on a respondeat theory, but only on the basis of the supervisor's own acts or omissions.'" Aponte Matos v. Toledo Dávila, 135 F.3d 182, 192 (1st Cir. 1998) (quoting Seekamp v. Michaud, 109 F.3d 802, 808 (1st Cir. 1997)). Moreover, supervisory liability attaches only if "(1) the behavior of [his] subordinates results in a constitutional violation, and (2) the [supervisor]'s action or inaction was 'affirmative[ly] link[ed]' to that behavior in that it could be characterized as 'supervisory encouragement, condonation or acquiescence' or 'gross negligence amounting to deliberate indifference.'" Seekamp, 109 F.3d at 808 (alterations

in original) (quoting Lipsett v. Univ. of Puerto Rico, 864 F.2d 881, 902 (1st Cir. 1988)). The indifference required to support § 1983 supervisory liability must be "deliberate, reckless or callous," Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 562 (1st Cir. 1989), and the requisite "affirmative link" "contemplates proof that the supervisor's conduct led inexorably to the constitutional violation." Hegarty v. Somerset County, 53 F.3d 1367, 1380 (1st Cir. 1995), cert. denied sub nom, Hegarty v. Wright, 516 U.S. 1029 (1995).

Under these standards, Grondin and Demitri cannot as a matter of law be held liable under a supervisory theory. The underlying rape by Timo occurred in 1995 during Nicole's freshman year, and the Complaint alleges no facts indicating that Grondin or Demitri could have prevented the rape from occurring. Nor does it allege that anything Grondin or Demitri did (or failed do) made the school especially conducive to the rape or the subsequent harassment by Timo, Hook, or other students. Rather, the allegations in the Complaint focus on Grondin's and Demitri's failure to redress the harassment of Nicole.[15] But the only allegation that Grondin or Demitri knew of the harassment was

[15]The Complaint also focuses on Grondin's and Demitri's failure to take appropriate action after they learned about the rape--such as notifying the police and Nicole's parents or taking any investigative steps. But given that Grondin and Demitri found out about the rape after the fact, any such failure does not relate to a deprivation of Nicole's right to bodily integrity. See Pierce, 119 F. Supp. 2d at 1152 (no § 1983 claim for failure to report and investigate child abuse, even where there was subsequent abuse after failure).

that "Nicole reported these incident [sic] of being pushed into lockers, to the principle [sic], but the school paid no attention to the reports." Complaint ¶ 25. Indeed, the Complaint alleges that the "physical intimidation continued during Nicole's freshman, sophomore, and junior years," id. ¶ 31, but Demitri was not made aware of any harassment until she first learned about the rape in the fall of 1998, when Nicole was a senior. Thus, the Complaint falls well short of alleging the "affirmative link" or "indifference" required to support supervisory liability.

Even were I to conclude that Nicole's report to Grondin of being pushed into lockers or, perhaps, Nicole's change in appearance and withdrawal from school activities were enough to link Grondin and Demitri affirmatively to the harassment--in short, that Grondin and Demitri were sufficiently put on notice and thus should have known about and stopped the harassment--a § 1983 claim based on substantive due process would nevertheless fail because there was no subordinate liability. There are no allegations that any school employees under the supervision of Grondin or Demitri affirmatively participated in the rape or harassment of Nicole; rather, the Does only allege the rape by Timo and harassment by Timo and other students. This case therefore is distinguishable from one in which a student alleges supervisory liability for failure to stop or prevent sexual abuse by a teacher or other school employee, see, e.g., Doe v. Bd. of Educ., 18 F. Supp. 2d 954 (N.D. Ill. 1998); here, the underlying assault and harassment were committed by private third parties.

As a general proposition, the Supreme Court in DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989), held that a state's failure to protect an individual against private violence does not constitute a 14th Amendment substantive due process violation. In DeShaney, the Wisconsin Department of Social Services, despite receiving reports that a four-year old boy, Joshua, was being abused by his father, failed to remove Joshua from his father's custody. Id. at 192-93. Joshua's father subsequently beat him so brutally that Joshua suffered permanent brain damage, leaving him severely retarded. Id. at 193. Joshua and his mother brought suit alleging that the state's failure to act deprived Joshua of his due process rights under the Fourteenth Amendment. Id. Despite the "undeniably tragic" facts, id. at 191, the Court found no due process violation, holding that

> nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. . . . [I]ts language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. . . . Its purpose was to protect the people from the State, not to ensure that the State protected them from each other.

Id. at 195-96.

The DeShaney Court, however, left open a narrow exception to its general holding where the state takes an individual into its custody and holds him there against his will, reasoning that

> it is the State's affirmative act of restraining the individual's freedom to act on his own behalf–through

incarceration, institutionalization, or other similar restraint of personal liberty-which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his

> liberty interests against harms inflicted by other means.

Id. at 200.[16]

Additionally, courts have fashioned a second exception to DeShaney, seizing on language by the DeShaney Court that "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it render him any more vulnerable to them." Id. at 201. Thus, courts have applied a "state-created danger" theory, not contingent on state custody, which allows for liability for foreseeable injuries where "state actors knowingly place a person in danger." Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198, 200 (5th Cir. 1994), cert. denied, 514 U.S. 1017 (1995).

Neither the custodial relationship exception nor the state-created danger exception applies in this case. As to the former, the Does have not alleged any specialized facts that give rise to a custodial relationship between themselves and defendants, and while the First Circuit has not addressed the issue, other courts have resoundingly concluded that, as a general matter, students do not stand in a custodial relationship with public schools or their officials for purposes of applying DeShaney. Armijo By and Through Chavez v. Wagon Mound Pub. Schs., 159 F.3d 1253, 1261 (10th Cir. 1998) ("Compulsory attendance laws for public schools

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[16]The Court found the exception inapplicable in DeShaney because Joshua was in the custody of his father when he suffered the injury, and the fact that the state once had taken temporary custody of Joshua did not constitute the custodial relationship required to invoke the exception. Id. at 201.

[] do not create an affirmative constitutional duty to protect students from the private actions of third parties while they attend school."); Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 732 (8th Cir. 1993) (same); D.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364, 1372 (3d Cir. 1992) ("[T]he school defendants' authority over D.R. during the school day cannot be said to create the type of physical custody necessary to bring it within the special relationship noted in DeShaney . . . ."), cert. denied, 506 U.S. 1079 (1993); J.O. v. Alton Cmty. Unit Sch. Dist. 11, 909 F.2d 267, 272 (7th Cir. 1990) ("[T]he government, acting through local school administrations, has not rendered its schoolchildren so helpless that an affirmative constitutional duty to protect arises.").

The allegations in the Complaint are similarly insufficient to support a state-created danger theory of liability. The only conduct of Grondin and Demitri at issue is their nonaction, including their failure to report the rape to Nicole's parents or the police and their failure to investigate, or more generally to prevent, the rape and harassment. Absent any affirmative action by school officials, the state-created danger theory does not open the door for due process violations for situations in which students are harmed by other students, even where the school deliberately ignores either a threat or actual prior instances of violence. See Nabozny v. Podlesny, 92 F.3d 446, 449, 460 (7th Cir. 1996) (no due process cause of action where homosexual student was continually harassed and physically abused by other

students, even though school administrators turned a "deaf ear" to the students requests for help and "themselves mocked [his] predicament"); Graham v. Indep. Sch. Dist., 22 F.3d 991, 995 (10th Cir. 1994) (no state-created danger where school employees ignored warnings that a student who had threatened violence against plaintiff's son was on school grounds with a gun, and plaintiff's son was subsequently shot and killed); Dorothy J., 7 F.3d at 731, 734 (plaintiff failed to state a due process claim where school did not protect a mentally retarded student from being sexually assaulted and raped by another student, even though school knew perpetrator had history of violent and sexually assaultive behavior); D.R. v. Middle Bucks, 972 F.2d at 1376 (plaintiff female students failed to state a claim where they alleged they were repeatedly molested and raped by male students and told defendant school official who failed to investigate or otherwise take any action).

As the Third Circuit stated in D.R. v. Middle Bucks:

> Accepting the allegations as true, viz., that one school defendant was advised of the misconduct and apparently did not investigate, they show nonfeasance but they do not rise to the level of a constitutional violation. As in DeShaney, "[t]he most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them."

972 F.2d 1376 (alterations in original)(quoting DeShaney, 489 U.S. at 203). Similarly here, even assuming the Does have presented sufficient evidence that Grondin and Demitri were aware of Nicole's situation at some point where they could have

intervened to prevent harassing behavior, a § 1983 claim under the Fourteenth Amendment cannot lie against Grondin and Demitri for their failure to respond. Accordingly, I dismiss Counts 3 and 4.

This leaves the § 1983 claims against the Town of Bourne in Count 2. Almost the entirety of Count 2 is devoted to allegations similar to those in Counts 3 and 4; the Does apparently contend that the failure of Grondin and Demitri to prevent or stop the rape and harassment of Nicole is evidence of a custom and practice by the school of a failure adequately to train its employees.[17] In this vein, the Complaint states:

> The Town of Bourne had a custom and policy of failing to train administrators, teachers, staff to recognize, to report, to investigate or to mitigate known or reasonably suspected incidents of sexual harassment by students against students.

Complaint ¶ 86. However, as noted above, Grondin and Demitri are not liable in their individual capacities under a due process-based § 1983 claim for their actions (or nonactions), and thus no § 1983 liability can lie against the Town of Bourne, or its school committee, for the same underlying conduct. See Wilson v. Town of Mendon, 294 F.3d 1, 7 (1st Cir. 2002) ("Without a finding of a constitutional violation on the part of a municipal employee, there cannot be a finding of section 1983 damages liability on the part of the municipality."). Accordingly, I

[17]Additionally, Count 2 contains allegations of a custom and policy of requiring school employees to violate state reporting laws. Complaint ¶ 86. As discussed above such violations are not a valid basis for § 1983 liability.

dismiss the § 1983 claims in Count 2.

Having dismissed all of the Does' § 1983 counts, I need not continue further. Nevertheless, given the vagueness of the § 1983 allegations in the Complaint, I will pursue one further matter to cover additional potential bases for the § 1983 claims that might lie in the Complaint. At least as an analytic matter, two possibilities not yet discussed remain as potential bases for the Does' § 1983 claims against the Town of Bourne or its school committee: namely, a Title IX violation or an equal protection violation.[18] There is scant, if any, indication in the Complaint that the Does seek to bring such claims; indeed, in their opposition brief, they only address a due process theory. In any event, to the extent they pursue such claims, I find that they are precluded, as a matter of law, by Title IX.

[18]Additionally, they could bring similar claims against Grondin and Demitri in their individual capacities (see supra note 13).

While the First Circuit has not addressed the issue, there is a split among circuits as to whether conduct actionable under Title IX can also support § 1983 claims. Compare Bruneau v. S. Kortright Cent. Sch. Dist., 163 F.3d 749 (2d Cir. 1998) (§ 1983 Title IX and equal protection claims precluded), cert. denied, 526 U.S. 1145 (1999), and Waid v. Merrill Area Pub. Schs., 91 F.3d 857 (7th Cir. 1996) (§ 1983 equal protection claim precluded), and Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779 (3d Cir. 1990) (same), with Crawford v. Davis, 109 F.3d 1281 (8th Cir. 1997) (§ 1983 equal protection and Title IX not precluded), and Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996) (constitutional § 1983 claims not precluded), and Lillard v. Shelby County Bd. of Educ., 76 F.3d 716 (6th Cir. 1996) (§ 1983 due process claim not precluded). In fact, there is disagreement within this district on this issue. Compare Canty v. Old Rochester Reg'l Sch. Dist., 54 F. Supp. 2d 66 (D. Mass. 1999) (Young, J.) (preclusion), with Doe v. Old Rochester Reg'l Sch. Dist., 56 F. Supp. 2d 114 (D. Mass. 1999) (Lasker, J.) (no preclusion). I find the reasoning of the courts that have found preclusion persuasive.

The underlying disagreement reflected in the circuit split concerns the applicability of the Supreme Court's decision in Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981), in the Title IX context. The crucial question posed by Sea Clammers is whether in enacting a federal statute, Congress intended to preclude related § 1983

claims, see Bruneau, 163 F.3d at 757, and this, in turn, depends on whether the enforcement scheme contained in the statute is "sufficiently comprehensive." See Sea Clammers, 453 U.S. at 20 ("When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.").

In finding that Title IX does not preclude § 1983 claims, the Sixth, Seventh, and Tenth Circuits have concluded that because Sea Clammers dealt with preclusion of statutory § 1983 claims, it did not prevent plaintiffs from bringing constitutionally-based § 1983 claims alongside Title IX claims for the same underlying conduct. Lillard, 76 F.3d at 722-23; Crawford,109 F.3d at 1284; Seamons, 84 F.3d at 1233-34. This reasoning, however, ignores the Supreme Court's decision in Smith v. Robinson, 468 U.S. 992 (1984), which, applying Sea Clammers, found that the Education of the Handicapped Act precluded § 1983 equal protection claims. Robinson, 468 U.S. at 1013. Thus, the efforts of the Lillard, Seamons, and Crawford courts to distinguish Sea Clammers for constitutional § 1983 claims seem to me unconvincing. See Bruneau, 163 F.3d at 757.

The Lillard, Seamons, and Crawford courts did, however, address the underlying question of Congress's intent in passing Title IX,[19] and they found that because the explicit enforcement scheme of Title IX does not contain a private right of action, it cannot be said to be comprehensive. Indeed, they concluded that the need for the Supreme Court to imply a private right of action in Title IX, as it did in Cannon v University of Chicago, 441 U.S. 677, 683 (1979), is evidence that the Title IX scheme is not comprehensive. Lillard, 76 F.3d at 722-23; Crawford,109 F.3d at 1284; Seamons, 84 F.3d at 1233-34.

Sea Clammers, however, says nothing about whether the express provisions of a statute must provide a comprehensive enforcement scheme; rather, the inquiry is focused on whether Congress intended the scheme it enacts to be a comprehensive one. To this end, the implied right of action should be considered as part of, not separate from, the enforcement scheme. See Bruneau, 163 F.3d at 757. Indeed, the Cannon Court implied a private right of action in Title IX because the statute is phrased "with

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[19] The Crawford court considered the intent issue to conclude that, under Sea Clammers, Title IX did not preclude § 1983 claims based on violations of the statute itself. Crawford, 109 F.3d at 1284. The Lillard and Seamons courts, however, not having statutory § 1983 claims before them, addressed the intent issue essentially as alternative grounds for their conclusions as to the constitutional § 1983 claims. Lillard, 76 F.3d at 723; Seamons, 84 F.3d at 1233-34. The Lillard court did, however, conclude in dicta that a Title IX-based § 1983 claim would not be precluded. The Seamons court, on the other hand, noted that a § 1983 claim based in a violation of Title IX would be barred. 84 F.3d at 1234 n.8 ("Of course, the 1983 action could not be predicated on a violation of Title IX itself. Such a duplicative effort would be barred").

an unmistakable focus on the benefited class." 441 U.S. at 691.

Given Title IX's complex administrative scheme, together with the private right of action implied in Cannon and the ability to recover monetary damages under Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 73-76 (1992), I follow the cases concluding that Congress enacted Title IX as a comprehensive enforcement scheme. Accordingly, to the extent the Does pursue § 1983 claims premised on equal protection violations or on violations of Title IX, they are precluded by Title IX.

3. Title IX (Count 1) and Emotional Distress (Counts 17-19)

Having concluded that the Does' § 504 and § 1983 claims should be dismissed, I turn to the Title IX and intentional infliction of emotional distress claims.

a. Statute of Limitations[20]

Defendants have raised a generalized statute of limitations argument with respect to these claims. They argue that a three-year statute of limitations applies to the claims, and they contend that the claims should be dismissed because each of the

[20]My treatment of the statute of limitations question here parallels and amplifies grounds I relied upon in orally granting summary judgment to the BSEA in the parallel case. See supra at 5-6 and Note 7.

claims accrued at least three years prior to when the Does filed the complaint in this case on July 5, 2002.

Defendants appear to be correct that Massachusetts's three-year statute of limitations for personal injury actions applies to the Title IX claims, Legoff v. Trustees of Boston Univ., 23 F. Supp. 2d 120, 127 (D. Mass. 1998); see Egerdahl v. Hibbing Cmty. College, 72 F.3d 615 (8th Cir. 1995) (applying Minnesota's personal injury limitations period to Title IX action); Bougher v. Univ. of Pittsburgh, 882 F.2d 74 (3d Cir. 1989) (Pennsylvania's personal injury limitations period applicable to Title IX); Nelson v. Univ. of Maine Sys., 914 F. Supp. 643 (D. Me. 1996) (applying Maine personal injury limitations period), and the intentional infliction of emotional distress claims. Mass. Gen. Laws ch. 260, § 2A; see Pagliuca v. City of Boston, 35 Mass. App. Ct. 820, 823 (1994).

Defendants contend that because, as discussed below, actual knowledge is required for liability under Title IX, the three-year limitations period for the Does' Title IX claims began to run in the fall of 1998, when Demitri first learned that Nicole had been raped by Timo. Knowledge by the school, or its employees, however, does not start the limitations period for the Title IX claims. Rather, accrual for such claims, which is governed by federal law, is determined by when the plaintiff knows or has reason to know of the injury on which the action is based. Nelson, 914 F. Supp. at 650; see Calero-Colon v. Betancourt-Lebron, 68 F.3d 1, 3 (1st Cir. 1995) (§ 1983 claims).

While defendants' premise as to accrual is wrong, their conclusion that the parent Does did not file within the three-year period is correct. The Title IX claim, based on the school's inadequate response to the rape and harassment of Nicole, cannot reasonably be based on any action after Nicole graduated. Indeed, the Complaint contains no allegations as to the school, Grondin, or Demitri beyond the spring of 1999. Given that the senior Does learned of the injury in March 1999 but did not file suit until July of 2002, I find that they did not file within the applicable limitations period.

As for the intentional infliction of emotional distress claims, Massachusetts law governs as to accrual, and in Massachusetts, personal injury actions ordinarily accrue at the time one is injured. Joseph A. Fortin Constr., Inc. v. Mass. Hous. Fin. Agency, 392 Mass. 440, 442 (1984). The rape by Timo occurred in the fall of 1995, and the harassment of Nicole occurred up through Nicole's junior year, which ended in 1998. In any event, as with the Title IX claims, the Complaint does not allege -- nor does any record evidence reflect -- any basis for the claims after Nicole graduated in the spring of 1999. Thus, the intentional infliction of emotional distress claims by the senior Does were also untimely filed.

The Does argue that under Mass. Gen. Laws ch. 260 § 12,[21]

[21]Section 12 states:
If a person liable to a personal action fraudulently conceals the cause of such action from the knowledge of the person entitled to bring it, the period prior to

the limitations period should be tolled as to Manuel and Carla because defendants fraudulently concealed information concerning their causes of action in this case. Specifically, they argue that the school, and Grondin and Demitri, owed them a fiduciary duty to reveal information concerning the rape and harassment of Nicole. However, according to an affidavit by Manuel submitted to the BSEA, Nicole told her parents about the rape on March 11, 1999. Plaintiffs' Opposition Ex. C, ¶ 4. The Does nevertheless argue that the limitations period should be tolled because the school never informed them of the duties it owed (and allegedly breached) to them. The Does, however, have provided no basis for such a fiduciary duty to disclose. Thus, I reject the Does' tolling arguments under the fraudulent concealment statute and dismiss the Title IX claims in Count 1 as to Manuel and Carla and the intentional infliction of emotional distress counts brought by Manuel and Carla in Counts 18 and 19, respectively.

However, as plaintiffs point out, Nicole, who was born on July 8, 1981, was still a minor in the spring of 1999. Under Mass. Gen. Laws ch. 260 § 7, the applicable limitations period is tolled until one reaches the age of eighteen. As a result, I find that Nicole had until July 8, 2002, three years after she turned eighteen, to file the present suit. Because the Does filed their complaint on July 5, 2002, Nicole's claims as to

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> the discovery of his cause of action by the person so entitled shall be excluded in determining the time limited for the commencement of the action.

Mass. Gen. Laws ch. 260 § 12.

Title IX (Count 1) and emotional distress (Count 17) are therefore not barred.[22] Accordingly, I turn to the substance of those claims.

b. Title IX - Substance

Title IX provides, in part, that:

> [n]o person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a). There are two ways in which sexual harassment in the educational context can constitute prohibited gender-based discrimination under Title IX. Frazier, 276 F.3d at 65. The first is quid pro quo harassment, which is not at issue in this case. The second is hostile environment harassment, which "covers acts of sexual harassment sufficiently severe and pervasive to compromise or interfere with educational opportunities normally available to students." Id.

In Davis v. Monroe County Board of Education, 526 U.S. 629 (1999), the Supreme Court held that a private damages action may lie under Title IX against a school board in cases of student-on-student harassment. Id. at 633. More specifically, the Court

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[22]In the administrative proceedings before the BSEA, the hearing officer rejected the tolling argument as to the Does' IDEA and § 504 claims, stating that applying the tolling statute would be contrary to the purposes of the IDEA and § 504 and additionally that the statute should not apply because parents' and students' rights are congruent with respect to educational services. AR, at 86. The Does did not challenge this ruling on summary judgment in the companion case, and I need not consider it here.

held that schools could be liable for damages under Title IX "where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." Id. at 650.

In this case, I find that Nicole has adduced insufficient evidence that the school's response to her situation reflected the level of deliberate indifference required under Monroe. As discussed previously, the only indication that any school official knew about any harassment prior to the fall of 1998 was the allegation in the Complaint, not substantiated by any evidence, that Nicole complained to Grondin about being pushed into lockers by other students. Even if Nicole did make such complaints, Grondin's non-response to them would not alone be actionable; incidents of being pushed into a locker, however objectionable, is not the type of severe, perverse, and objectively offensive harassment described in Monroe.

It is not disputed that when they learned in the fall of 1998 that Nicole had been raped, no school official reported the conduct to the police or Nicole's parents or took any investigative measures. While I neither condone nor approve of the school's failure to take more active responsive measures, I cannot find that there is a triable issue as to whether the response of those who knew of the rape was "clearly unreasonable in light of the known circumstances." Monroe, 526 U.S. at 648.

Demitri, upon learning of the rape, referred Nicole to a rape counselor and subsequently informed Grondin of the situation. Grondin, apparently faced with Nicole's desire that her parents not be informed, sought advice from town counsel how he should proceed. Timo had, by the fall of 1995, already graduated, and according to the Complaint, there was no ongoing harassment of Nicole at that time. Whatever the deficiencies of Demitri's and Grondin's responses, I find that Nicole has not made a sufficient showing that it was so "deliberately indifferent to circumstances that "deprive[d her] of access to the educational opportunities or benefits provided by the school." Id. at 650. Thus, I conclude that their failure to take affirmative measures upon learning of the rape was not "clearly unreasonable," and I grant defendants' motion for summary judgment as to the Title IX claims. See id. at 649 ("In an appropriate case, there is no reason why courts, on a motion to dismiss, for summary judgment, or for a directed verdict, could not identify a response as not 'clearly unreasonable' as a matter of law.").

c. Intentional Infliction of Emotional Distress - Substance

To prevail on her claim for intentional infliction of emotional distress, Nicole must establish "(1) that the defendant intended to inflict emotional distress, or knew or should have known that emotional distress was the likely result of his conduct, but also (2) that the defendant's conduct was extreme

and outrageous, beyond all possible bounds of decency and utterly intolerable in a civilized community, (3) the actions of the defendant were the cause of the plaintiff's distress, and (4) the emotional distress suffered by the plaintiff was severe and of such a nature that no reasonable person could be expected to endure it." Tetrault v. Mahoney, Hawkes & Goldings, 425 Mass. 456, 466 (1997) (quoting Payton v. Abbott Labs, 386 Mass. 540, 555 (1982)). The findings above as to the Title IX claims are equally applicable in this context. Accordingly, I find that the school's response to Nicole's situation was not, as a matter of law, so extreme and outrageous as to constitute intentional infliction of emotional distress. I therefore dismiss the claims as to the Town of Bourne and its school committee, Grondin, and Demitri.

III. CONCLUSION

For the reasons set forth more fully above, the motion for summary judgment brought by defendants Town of Bourne, Bourne School Committee, Grondin, and Demitri is GRANTED.

/s/ Douglas P. Woodlock

DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE